Filed 4/15/03 P. v. Gutierrez CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ARTURO RAMOS GUTIERREZ, Defendant and Appellant.	2d Crim. No. B154418 (Super. Ct. No. CR49185) (Ventura County)

Arturo Ramos Gutierrrez appeals from the judgment entered following his conviction by a jury on three counts of continuous sexual abuse of a child under the age of 14. (Pen. Code, § 288.5.)[1] Each count alleged that appellant had been previously convicted of (1) a sexual offense within the meaning of the habitual sexual offender statute (§ 667.71) and (2) a prior serious or violent felony within the meaning of the "Three Strikes" law. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).) Appellant did not admit the allegations, and neither the jury nor the trial court determined their truth. Nevertheless, the trial court sentenced appellant as if the allegations had been admitted or found true. Appellant was sentenced to prison for 50 years to life on each count. The aggregate prison term was 150 years to life.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant contends: (1) the sentence was unauthorized because it was based on prior conviction allegations that were neither admitted nor found true; (2) the sentence constituted cruel and unusual punishment under the federal and state Constitutions; (3) the trial court erroneously failed to give a limiting instruction on fresh complaint evidence; (4) the trial court erroneously instructed the jury pursuant to CALJIC No. 2.50.01; and (5) Evidence Code section 1108 is unconstitutional.

Respondent concedes that the first contention has merit. Accordingly, we remand the matter for trial on the truth of the prior conviction allegations and for resentencing. In view of this disposition, we do not consider the second contention. We reject appellant's remaining contentions.

Prior Conviction Allegations[2]

The prior conviction allegations were based on a single offense: the commission of a lewd act upon a child under the age of 14 in violation of section 288, subdivision (a) Pursuant to Evidence Code section 1108, the trial court admitted evidence of this prior offense to prove appellant's sexual propensity. The evidence was introduced through a stipulation that was read to the jury. In addition to stipulating to the facts of the prior offense, the parties also stipulated that appellant had pleaded guilty to violating section 288, subdivision (a), and had been sentenced to state prison.

Despite the stipulation, appellant did not admit the prior conviction allegations. Appellant told the trial court that the allegations should be read to the jury

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[2] We omit a summary of the evidence presented at trial. The evidence is irrelevant to the issues in this appeal

and that he was reserving the right to "contest" their truth.[3] The court minutes, however, erroneously state that appellant admitted the allegations.

The prior conviction allegations were never submitted to the jury for decision. Appellant did not object to the discharge of the jury after the guilty verdicts were rendered. The trial court did not find the allegations true.

At the probation and sentencing hearing, the parties and the trial court appear to have assumed that appellant had admitted the prior conviction allegations. In its sentencing memorandum, respondent stated that appellant had "admitted all the prior allegations and [had] admitted all the other allegations contained in the **Amended Information.**" Neither appellant nor the trial court disputed this statement. The trial court denied appellant's motion to strike the prior conviction.

The Matter Must Be Remanded For Trial On The Truth
Of The Prior Conviction Allegations And For Resentencing

Appellant contends that the trial court lacked authority to sentence him under the habitual sexual offender statute and the Three Strikes law because "there was no trial on the prior conviction, there was no admission . . . of the prior conviction and there was no finding concerning that prior conviction." Respondent concedes that appellant's contention has merit.

We accept respondent's concession. The stipulation concerned evidentiary facts and was not an admission of the truth of the allegations. "[S]uch evidentiary

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3 Before the trial began, the trial court asked appellant's counsel: [I]s your client going to waive jury and admit the prior, or are you going to have a bifurcated trial and wait until after the results? Otherwise, I have to read the prior to the jury." The prosecutor informed the court that the parties were going to stipulate before the jury that appellant had pleaded guilty to violating section 288, subdivision (a). The court responded: "All right. So might as well just read the prior then." Appellant's counsel replied: "Right, assuming I can contest that. No point to bifurcate."

stipulations are not an admission that the allegation is true. . . . [T]he jury or court must still find the allegation is true . . . ." (*People v. Adams* (1993) 6 Cal.4th 570, 580, fn. 7.)[4]

Accordingly, we remand the matter for trial on the truth of the prior conviction allegations and for resentencing. State and federal double jeopardy protections are inapplicable. (*Monge v. California* (1998) 524 U.S. 721, 734; *People v. Monge* (1997) 16 Cal.4th 826, 845.) *People v. Mitchell* (2000) 81 Cal.App.4th 132, is distinguishable. In *Mitchell* the evidence was insufficient to support true findings on prior serious felony conviction allegations.

Appellant Waived A Limiting Instruction
On Fresh Complaint Evidence

Under the "fresh complaint" doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose - namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others . . . ." (*People v. Brown* (1994) 8 Cal.4th 746, 749-750.) Upon request, the trial court must instruct the jury of the limited purpose for which the fresh complaint evidence is being admitted. (***Id***., at p. 757.) "It is established that in the absence of a request for a limiting instruction the trial court has no duty to give such an instruction. [Citations.]" (*People v. Moore* (1988) 201 Cal.App.3d 877, 886; see also *People v. Brown, supra,* 8 Cal.4th at p. 757.)

Appellant contends that the trial court erroneously failed to give a limiting instruction on fresh complaint evidence. Appellant waived such an instruction because he failed to request it.

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[4] Respondent does not contend that, at the time of sentencing, the trial court impliedly found the prior conviction allegations true. (See *People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17; *People v. Chambers* (2003) 104 Cal.App.4th 1047, 1050-1051.) It is questionable whether such a finding may be implied. As noted above, the trial court appears to have erroneously assumed that appellant had admitted the allegations. True findings need not be made on allegations that have been admitted. (§§ 667.71, subd. (d), 1158.)

Appellant argues that a waiver did not occur because he "made clear his desire for such an instruction with this statement in open court: '[M]y understanding is that [the fresh complaint] issue is going to be raised to show that the victims made the complaint not for the truth of the complaints themselves, and there's a jury instruction to that effect.' " But appellant's observation that "there's a jury instruction to that effect" fell short of a request for a limiting instruction. Moreover, the statement was made before the trial began, when the issue of jury instructions was not before the court. The minutes show that, seven days later after both sides had rested, the court and counsel met in chambers "off the record" to "settle" the instructions. If appellant wanted a limiting instruction, he should have expressly requested it at that time on the record to preserve the issue for appeal.

Appellant alleges that remarks by the prosecutor to the jury during his opening statement "reflected the understanding" that a limiting instruction would be given. The prosecutor said: "You'll get a special instruction from the judge telling you how to view [the fresh complaint] evidence." The prosecutor's remarks were no substitute for an explicit request by appellant that a limiting instruction be given. In the absence of such a request, a limiting instruction was not required.[5]

The Trial Court Did Not Err In Giving CALJIC No. 2.50.01

The trial court gave a modified version of the 2001 revision of CALJIC No. 2.50.01 on evidence of other sexual offenses.[6] Appellant contends that the instruction

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[5] In his reply brief, appellant argues for the first time that counsel's failure to request a limiting instruction violated his constitutional right to the effective assistance of counsel. We need not consider this untimely argument. (*People v. Murphy* (2001) 25 Cal.4th 136, 159; *People v. King* (1991) 1 Cal.App.4th 288, 297, fn. 12.)

[6] As modified by the trial court, the instruction provided: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case. [¶] ['Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following: [¶] [A.] [Any conduct made criminal by Penal Code section 288(a). The elements of [this crime] are set forth elsewhere in these instructions.] [¶] [C.] [Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.] [¶] If you find that the defendant

violated his due process rights because "there was reasonable likelihood [it] misled jurors to believe they could infer [his] guilt merely from his commission of a prior offense."

Our Supreme Court recently held that "the 1999 version of CALJIC No. 2.50.01 correctly states the law." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) The court concluded that "the instruction adequately confines the weight and significance of uncharged offenses within constitutional bounds by warning . . . that the uncharged offense is 'not sufficient by itself to prove beyond a reasonable doubt that [defendant] committed the charged crime.' Jurors would reasonably understand that the weight and significance they may accord this evidence must stay within these parameters." (***Id***., at p. 1014.) "[N]o juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense." (***Id***., at p. 1015.)

The 2001 revision of CALJIC No. 2.50.01, as modified by the trial court, is substantially the same as the 1999 version. Accordingly, the trial court did not commit instructional error.

Evidence Code Section 1108 Does Not Violate Due Process

"[Evidence Code] [s]ection 1108 permits the prosecution to prove a defendant's sexual propensity through evidence of specific instances of conduct." (*People v. McFarland* (2000) 78 Cal.App.4th 489, 491.) Appellant contends that, "in authorizing the introduction of propensity evidence, [the section] violates federal and state constitutional rights to due process of law."

We summarily reject appellant's contention. In *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court rejected a due process challenge to Evidence Code section 1108. (See also *People v. Reliford, supra,* 29 Cal.4th at p. 1009.)

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committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused. *It is not sufficient by itself to prove beyond a reasonable doubt that [he] committed the charged crime[s]*. The weight and significance of the evidence, if any are for you to decide. [¶] [[Unless you are otherwise instructed, y] [Y]ou must not consider this evidence for any other purpose.]" (Italics added.)

Disposition

The sentence is vacated. The matter is remanded for trial on the truth of the prior conviction allegations and for resentencing. In all other respects, the judgment is affirmed. After resentencing, the trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Herbert Curtis III, Judge

Superior Court County of Ventura

Susan Pochert Stone, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane, Jason C. Tran, Deputy Attorneys General, for Plaintiff and Respondent.